IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-895

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL VAN LINES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

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* This brief is filed with the express written consent of counsel for both Petitioner and Respondent.

This brief *amicus curiae* supports the position of the respondent in urging affirmance of the decision below holding that the commission of unfair labor practices during an economic strike does not *automatically* and *mechanically* convert the strike into an unfair labor practice strike. The *amicus* believes, with the court below, that a finding of conversion should result only where evidence establishes that the commission of such unfair labor practices did, in fact, alter the strikers' purpose and prolong the strike,—a conclusion which need not follow from the occurrance, after the inception of a strike, of certain prohibited practices. The *amicus* further supports respondent's request for corrective clarification of the decision below insofar as it provides tacit judicial acceptance of petitioner's efforts unduly to expand the concept of "protected, concerted activity".[1]

The interest of the *amicus* is predicated upon the significance of this case to that complex body of law which has been structured through the accommodation of the need for reasonable "striker protection" with those practical operating necessities encompassed within the concept of "legitimate and substantial business justifications". *N.L.R.B.* v. *Fleetwood Trailers Co.*, 389 U.S. 375 (1967); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). That body of law, and the very balancing process upon which it is premised, will be undermined if this Court rules, as petitioner seeks, that the mere

[1] The court below specifically refrained from passing on the question of whether a strike to force immediate recognition absent any prior demand therefor is lawful (App. A, p. 24, note 4). In its Petition For A Writ of Certiorari (pp. 11-12, 18-21), petitioner treats the legal principles to be derived as equally applicable whether the strike be considered one to pressure consent to an election or to force immediate recognition without any prior demand. (App. D, pps. 39-40). Under such circumstances, and for the reasons specified by respondent earlier, such effort disproportionately to expand the concept of "protected, concerted activity" must be dealt with and confined within meaningful limits (Respondent's Answer to Petition).

occurrence of an unfair labor practice during the course of a strike, without evidence or analysis of its effect, if any, on the strikers, automatically converts the purpose and objective of the strike activity.

The "mechanical rule" of "automatic conversion" for which petitioner seeks this Court's approval would eradicate the finely drawn distinctions between the economic-striker-reinstatement rule[3] and the unfair-labor-practice-striker reinstatement rule.[4] These established distinctions carry with them important practical remedial consequences and are of substantive import in the accommodation or balancing process which is the fabric of federal labor law.[5] The determination as to which of these rules applies in a given case should not therefor depend on mere assumption which has no necessary logical predicate. Petitioner's affirmative assertion of its "mechanical" rule under the strike circumstances present here "would, far from promoting the peaceful settlement of labor disputes, inject a judicially fashioned element of chaos into the field of labor relations" (*N.L.R.B.* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457, 465 (2d Cir. 1958)).

The importance to the Chamber of a resolution of the issue presented traces to the continuing need to illuminate the balance which the National Labor Relations Act effects between the protection of strikers' rights and the recognition of employers' legitimate needs.[6]

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[3] *N.L.R.B.* v. *Fleetwood Trailers Co.*, supra; *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[4] *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1956).

[5] *Retail, Wholesale and Department Store Union* v. *N.L.R.B.*, —— F. 2d ——, 80 LRRM 3244 (D.C. Cir. 1972).

[6] The Court has affirmed the fact that the Act's purpose to promote labor stability and industrial peace and order is of equivalent significance with its protection of strike or other union activity. *Boy's Market, Inc.* v. *Retail Clerks*, 398 U.S. 235 (1970); *Central Hardware Company* v. *N.L.R.B.*, —— U.S. ——, 80 LRRM 2769 (1972).

The Chamber has, in the past, appeared as *amicus curiae* in this Court in order to participate and assist in the task of striking that balance in a wide range of labor relations matters of vital concern to its members.[6] The Chamber's instant effort is similarly motivated.

STATEMENT OF THE CASE

The full import of the strike-conversion rule which the Board would have this Court adopt can best be appreciated when applied to the facts presented in this case.

The record reveals that neither the respondent-employer nor, more significantly, the employees whose rights are involved, were informed or knew the purpose or causes for the union's picketing activity when such activity began at the respondent-employer's business premises on October 4, 1967. The union, which had never demanded recognition from the respondent-employer either at the time it filed its petition for recognition or when it began picketing, gave varying "reasons" for the direction of economic pressures against this respondent-employer; thus, according to the union, the "object" of the picketing was *either* to force agreement to a consent election which the union inaccurately informed respondent's employees had been withdrawn by respondent, *or* to force recognition without an election, *or* to "protest" the discharges of employees employed by other van and storage companies the union was concurrently attempting to organize, *or* for other purposes still undisclosed. Regardless of the multiple "causes" the union attributed to the commencement of picketing activities against the respondent-employer, the strikers' purpose or motivation in striking is revealed by

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[6] For example, *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Boy's Market, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, —— U.S. —— 30 L. Ed. 2d 341 (1971); *N.L.R.B.* v. *Burns International Security Services, Inc.*, —— U.S. ——, 80 LRRM 2225 (1972).

the following: first, the employees of the respondent-employer did not participate in the picketing activity when it began, did not know it would occur when it did and did not know what it was about when it started in the morning of October 4; second, respondent's employees refused to come to work by crossing the "stranger" picket line only because of their confusion with regard to the purpose, meaning, and effect of the picketing; and third, the extent to which the alleged unfair labor practices motivated the strikers is revealed in the fact that their applications for reinstatement were conditioned upon the execution of a collective bargaining agreement and were silent as to the existence of any unlawful practices or the need to remedy them. (A. 18, 19, 23, 26-29, 32-37, 49-51).[7]

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[7] The question as to whether the strikers were discharged and not merely replaced, while not specifically raised by the parties, is worthy of this Court's attention. The issue centers on the respondent's telegram of October 5, 1967 notifying employees that "for failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced." Had the telegram simply stated the fact of replacement without explanation, that would presumably not have offended the law in any party's view. That the respondent had specific shipping requirements, essential for his business welfare, scheduled for October 4 is not in question. Since the justification for permitting replacements is grounded in a recognized need for the struck employer to continue to run his business, and since the employer here had every reason to expect that the striking employees who were absent on October 4 would not return to work on October 5 to perform essential work, therefore their replacement was a reasonable and permissible act under the circumstances. The telegram of October 4 merely telescoped these propositions.

Even should the strikers be deemed to have been discharged, there is no record basis for concluding that they understood other than they had been replaced, as the telegram stated.

(With the exception of record evidence demonstrating the employees' ignorance of the purpose for the picketing on October 4 or the fact such activity would occur when it did, the facts set out in the text above are contained and set out in the petitioner's "Statement" of its Findings of Fact (Petitioner's Brief, pps. 3-7) and in respondent's supplementary "Statement of the Case" (Re-

That these facts were deemed by the Board to constitute an appropriate vehicle for the application of its rule effecting an automatic conversion of an economic to an unfair labor practice strike demonstrates the need to affirm the decision below. For the combination of the strikers' total confusion as to the purpose for the strike, the unions' multiple and inconsistent subsequent explanations of its objective, the likelihood that different employees would therefore have different views as to the strike's goal, and the evidence afforded by the nature of the qualified applications for reinstatement—cumulatively negative the probability that these strikers changed "the" object of the strike or that they "prolonged" their activity as a consequence of unlawful conduct as to which their reinstatement applications made no express mention.

SUMMARY OF ARGUMENT

1.) The rules relating to the reinstatement rights of economic strikers were created to achieve different objectives, to effect a differing balance between employees' and employers' needs and to afford a different level of relief than rules relating to the reinstatement rights of unfair labor practice strikers. The latter rules are designed not merely to protect strikers' status as "employees", but affirmatively to protect their right to protest and seek relief through self-help against unlawful conduct whose impact consciously leads the strikers to prolong their strike in specific protest against such conduct.

The Circuit Courts of Appeals, including the court below, have held that the commission by an employer of unlawful acts during an economic strike does not con-

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spondent's Brief, pps. 7-8). The facts reflecting the lack of knowledge by respondent's employees with respect to the reasons for or timing of the union's picketing activity on October 4 are contained and set out in Pet. Appendix D, pps. 38-42 and Pet. Appendix D, pps. 52-60.)

vert the status of economic strikers to those of unfair labor practice strikers absent proof that the strikers altered their strike purpose and prolonged their strike as a direct result of such improper conduct. The Board's contrary view that unfair labor practices automatically or necessarily convert the nature of an economic strike, without any need for specific evidence or proof, fails to preserve the distinctions between these categories of strikers, fails to give effect to the logic of the unfair-labor-practice-striker rule, and constitutes a conflict with the Circuit Courts which requires resolution by this Court in the interest of a uniform and predictable application of the labor laws.

2.) A strike whose purpose is to prohibit or impede any person's access to the processes of the Board is contrary to sound policy and to Congress' intent in creating a guaranteed statutory framework for the resolution of disputes. Those who participate in such a strike do not engage in activity which is protected by Section 7 of the National Labor Relations Act. (*N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418 (1968)). The strike in this case was designed, according to the Board's findings, to compel the employer's consent to an election despite the pendency of representation proceedings before the Board or to compel immediate recognition of the union absent an election. The success of either purpose would force the employer to forego the rights and protections guaranteed in the statute to a full hearing (Section 9(c)) and an election in which to determine the employees' union preferences (*N.L.R.B.* v. *Gissell Packing Co.*, 395 U.S. 575 (1969)). Since in either event the strikers' object was to coerce the employer's abandonment of a statutory right to access to Board processes, the conduct of the strikers was not protected by Section 7 of the Act.

ARGUMENT

A. The Commission Of Unfair Labor Practices During An Economic Strike Should Not Automatically And Without Further Investigation Convert The Strike Into An Unfair Labor Practice Strike.

This Court and the Courts of Appeal, with rare exceptions (e.g., *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962)), have refused to sanction the automatic application of mechanical rules by the petitioner-Board in the complex socio-economic area of labor law. Such a refusal is the substance of the rejection by the court below of the Board's finding, without analysis or evidence, that the "natural effect" of "discharge" of the economic strikers converted the economic walkout into an unfair labor practice strike (Appendix D, p. 41). The court below properly found that absence of *any* evidence in support of that supposed "necessary" effect precluded enforcement of such an easy finding of "conversion" (Appendix A, pps. 27 and 28 and Note 5).

The insistence of the court below upon *proof of conversion of the strike activity* is the only proper approach to preservation of the substantial distinctions flowing from the economic-striker-reinstatement and unfair-labor-practice-striker reinstatement rules.[8]

Each rule, with the panoply of rights and obligations attendant to it contains strong protections for the right to strike balanced against the employers' need to operate their business enterprises.[9] Since each rule represents a

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[8] *N.L.R.B.* v. *Fleetwood Trailers Co.*, 389 U.S. 375 (1967); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S 26 (1967); *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1956); *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[9] The operation of these rules involves variables which affect the result in each case and seek to conform the operations of the rules to the equity of the situations they govern. These variables include, for example, for example, the nature of the strikers' conduct

separate remedial need, to apply one where the other is appropriate adversely affects the statutory scheme laboriously fashioned by Congress and the courts.

1) *Courts Have Not Approved The Board's Theory of "Automatic Conversion" Of Strike Objectives.*

The very nature of the economic-striker and unfair-labor-practice striker rules, and the substantial difference in the degree of protection which each affords has consistently led courts to an avoidance of mechanical rules in determining which rule applies in a given case.

With the exception of those cases where the unfair labor practices committed are so "flagrant" that the only rational inference is that strike activity must have been prolonged as a result, (*N.L.R.B.* v. *Supreme Dyeing & Finishing Corp.*, 340 F. 2d 493 (1965)), all the Circuits require analysis of the initial "cause" or "causes" of the strike activity and a demonstration of causal relationship between the unfair practices alleged to have occurred and prolongation of the strike activity. Thus, although the Second Circuit has upheld a finding of conversion where the employer's unfair labor practices are "ongoing" thereby "necessarily" prolonging the

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as contrasted with the severity of the employers' acts (*N.L.R.B.* v. *Thayer Co.*, 213 F. 2d 748 (1st Cir. 1954)); the character and timing of requests for reinstatement (*N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); the permanency of replacement (*Retail, Wholesale and Department Store Union* v. *N.L.R.B.*, —— F. 2d ——, 80 LRRM 3244 (DC Cir. 1972), *Laidlaw Corp.* v. *N.L.R.B.*, 414 F. 2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

The nature and operation of these variables are, of course, subject to continuing review in terms of their effect on the proper balance to be accorded to the parties' competing needs. *Laidlaw*, for example, presents serious problems to an employer's efficient administration of his business in seeking, in effect, to create an open-ended duty to reinstate "replaced" economic strikers.

strike [10] each of those cases involved specific evidence of anti-union motivation underlying the unfair practices involved. Where, however, the unfair practices are not of such "flagrant" and "ongoing" character, the Second Circuit requires analysis and evidentiary proof of causal relationship between the employer unfair conduct and strike prolongation.[11] The same distinction between "flagrant, ongoing" unfair practices which do not require specific evidence of prolongation and those cases where strike conversion must be proven by specific evidence of causal relationship is reflected in the decisions of the Third Circuit,[12] the Fifth Circuit,[13] the Seventh Circuit,[14] and the Tenth Circuit.[15] The District of Columbia Circuit regularly demands analysis of the strike's

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[10] *N.L.R.B.* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 404 (1953), cert. denied, 347 U.S. 953 (1954); *N.L.R.B.* v. *Remington Rand, Inc.*, 130 F. 2d 919, 928 (1942); *Black Diamond S.S. Corp.* v. *N.L.R.B.*, 94 F. 2d 875, 879, cert. denied, 304 U.S. 579 (1938).

[11] *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 743, 749 (1953).

[12] *International Electrical, Radio & Machine Workers, Local 613,* v. *N.L.R.B.*, 328 F. 2d 723, 725-726 (1964) requiring specific evidence of prolongation; *N.L.R.B.* v. *Crowley's Milk Co.*, 208 F. 2d 444, 445 (1953).

[13] *Southwestern Pipe, Inc.* v. *N.L.R.B.*, 444 F. 2d 340 (1971), reversing the Board because of absence of proof of causal connection between the unfair labor practice and the strike; *N.L.R.B.* v. *Southern Beverage Co.*, 423 F. 2d 720 (1970); *N.L.R.B.* v. *Flowers Baking Co.*, 418 F. 2d 244 (1969); *N.L.R.B.* v. *Trinity Valley Iron & Steel Co.*, 290 F. 2d 47 (1961); and *N.L.R.B.* v. *Reliance Clay Products Co.*, 245 F. 2d 599 (1957).

[14] *Griffin Pipe Div. of Griffin Wheel Co.* v. *N.L.R.B*, 320 F. 2d 656, 659 (1963), *N.L.R.B.* v. *Jackson Press Inc.*, 201 F. 2d 541, 546 (1953) and *M. H. Ritzwoller* v. *N.L.R.B.*, 114 F. 2d 432, 433 (1940), all requiring specific evidence and findings of "prolongation"; *N.L.R.B.* v. *Waukesha Lime & Stone Co.*, 343 F. 2d 504 (1965).

[15] *Kansas Milling Co.* v. *N.L.R.B.*, 185 F. 2d 413, 420 (1950) requiring proof of causal connection; *N.L.R.B.* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056 (1971).

initial causes and specific evidence of prolongation in "conversion" cases.[16] The Sixth Circuit, although recognizing the proof of "prolongation" requirement, holds that once employer unfair practices are proven, the burden of showing absence of causal connection falls upon the employer.[17] Similarly, the Fourth Circuit demands proof of causal connection between the unfair practice and the strike's prolongation, but imposes the duty upon the Board's General Counsel to carry the burden of producing evidence showing prolongation before any finding of "conversion" will be upheld.[18] The court below, although on occasion finding conversion absent proof of causal connection and prolongation,[19] has acknowledged that the other Circuits require a causal relationship between employer unfair labor practices and the prolongation of a strike,[20] and imposed that requirement in the case at bar (App. A, pp. 27 and 28 and Note 5).

Thus, absent at least some probative evidence to determine that employees engaged in an economic strike did in fact alter and prolong their activity in view of the commission of some unlawful acts during a strike, the Circuit Courts have not permitted speculation to determine the parties' rights and duties.

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[16] *Local 833, U.A.W.* v. *N.L.R.B.*, 300 F. 2d 699 (1962), cert. denied, 382 U.S. 836 (1965); *General Drivers & Helpers Local 662* v. *N.L.R.B.*, 302 F. 2d 908, 911, cert. denied, 371 U.S. 826 (1962).

[17] *Phillip Carey Mfg. Co.* v. *N.L.R.B.*, 331 F. 2d 720, 728-729 cert. denied, 379 U.S. 888 (1964); *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 236 F. 2d 898, 907 (1956), aff'd. in part, reversed in part and remanded in part on other issues, 356 U.S. 342 (1958).

[18] *Winn-Dixie Stores, Inc.* v. *N.L.R.B.*, —— F. 2d —— (1971); *Alba-Waldensian, Inc.* v. *N.L.R.B.*, 404 F. 2d 1370, 1371 (1968); *Jeffery-DeWitt Insulator Co.* v. *N.L.R.B.*, 91 F. 2d 134, 139, cert. denied, 302 U.S. 731 (1937).

[19] *N.L.R.B.* v. *Tom Joyce Floors, Inc.*, 353 F. 2d 768, 772 (9th Cir. 1958).

[20] *N.L.R.B.* v. *Scott & Scott*, 245 F. 2d 926, 929 (9th Cir. 1957).

That the Board nonetheless persists in asserting as it does here, that conversion of the strike is automatic upon the commission of such unlawful acts, establishes a need for this Court to declare the impropriety either of the Board's approach to the question or that of the courts.

2) ***The Courts' Approach To The Analysis Of Strike Conversion Is Correct.***

The necessity for proof of strike "causation" and "motivation", both from the standpoint of the strike's initiation as well as where its objective is alleged to have been "converted", is inherent in the rationale of the unfair-labor-practice-striker rule and the broader protections it affords employees under the act. Thus, the logic of providing unfair practice strikers with reinstatement rights not extended to economic strikers [21] and with greater potential for back pay [22] and the reasoning behind shelter-

[21] An economic striker may be permanently replaced at any time prior to his unconditional application for reinstatement (*N.L.R.B.* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-346 (1938)) although retaining certain as yet not fully defined (See, e.g., Martin, *Rights of Economic Strikers to Reinstatement: A Search for Certainty*, 1970 Wis. L. Rev. 1062) preferential rehire rights after permanent replacement (*N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 380-381 (1967); *Laidlaw Corp.* v. *N.L.R.B.*, 414 F. 2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970)). By comparison, an unfair labor practice striker is entitled to immediate reinstatement upon unconditional application therefor and cannot be permanently replaced either before or after such application (*N.L.R.B.* v. *Fotochrome, Inc.*, 343 F. 2d 631 (2d Cir.), cert. denied, 382 U.S. 833 (1965); *N.L.R.B.* v. *Dubo Mfg. Corp.*, 353 F. 2d 157 (6th Cir. 1965).

[22] Coincident with the greater reinstatement rights of unfair labor practice strikers discussed in Note 21 *supra*, the unfair practice striker is entitled to back pay from the time he qualifies for reinstatement until he is either offered reinstatement or is actually reinstated, whereas the economic striker who makes unconditional application is able to collect back pay, if any, only from the date substantially equivalent jobs are available. E.g., *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17 (1954).

ing the unprotected activity of unfair labor practice strikers while denying such shelter to the same activity of economic strikers (*N.L.R.B.* v. *Thayer, supra.*) purportedly rests upon a need to encourage activities designed to "protest" and "remedy" the commission of unfair labor practices.[22] Similarly, the release of unfair labor practice strikers from the contractual restraints

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[22] *Mastro Plastics Corp.* v. *N.L.R.B., supra; N.L.R.B.* v. *Thayer, supra.*

A predicate for the theory and rationale for extending greater protections to unfair labor strikers than to those who strike in support of "economic" demands is that such additional encouragement is necessary to allow employees either to replace or supplement the unfair labor practice procedures and remedies of the National Labor Relations Board. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-33 (1947), in relevant part, states:

> "(3) Employee—The House bill changed the definition of 'employee' contained in the existing law in several respects: (A) Under the existing definition of 'employee' the Board has treated employees striking for wages, hours, or working conditions differently from employees striking because of an alleged unfair labor practice on the part of the employer. In the former case the Board has said that the individual striker retains his status as an employee under the act only until he is replaced, whereas in the latter case the Board has said that the individual striker retains his status as an employee so long as the labor dispute is 'current'. This Board practice has had the effect of treating more favorably employees striking to remedy practices for which the National Labor Relations Act itself provides a peaceful administrative remedy, than employees who are striking merely to better their terms of employment. The House bill in the definition of employee provided in specific terms that these two classes of striking employees should be treated in the same fashion, i.e., they were to retain their employee status until replaced.
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> . . . (c) The conference agreement does not contain the specific provisions of the House bill dealing with the status of 'unfair labor practice' strikers. Since the different treatment of unfair labor practice strikers and economic strikers is simply a practice of the Board which the Board can change within the framework of the existing law, it was thought by the House managers that the Board should be given an opportunity to change this practice itself rather than needlessly complicating the definition of the term 'employee'."

applicable to economic strikers [24] and the exemption of unfair labor practice strikers from the provision of Section 8(d)(4) of the Act involving strikers' loss of their status as "employees".—which provision remains applicable to economic strikers,—are premised upon an alleged necessity to effectuate remedial self-help by strikers who feel their rights jeopardized by specific unlawful conduct.[25]

However, the need for effective means to protest or remedy another's unlawful acts must presuppose both knowledge of such acts and a concern as to their impact sufficient to motivate a specific exercise of protest. Employees not so motivated, whether through lack of information, lack of concern because the unlawful acts are in their view minor or otherwise subject to correction in arbitration or NLRB proceedings, because of their consuming concern for their economic objectives, or otherwise, do not fall within the class of persons for whom the protections of the unfair-labor-practice-striker rule were created. The requirement of this rule that the alleged unfair practices "prolong" the strike emphasizes the requirement that for its operation those practices must constitute a specific, serious and independent focus of the strikers' protest.

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[24] For example, the operation of contractual "no-strike" clauses. *Mastro Plastics Corp.* v. *N.L.R.B.*, *supra*. The effect of this Court's decision in this context of *Boy's Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970) is perhaps open to doubt. This Court was not presented with and did not decide the question whether an injunction would lie against an unfair labor practice strike during the term of a labor agreement containing a "general" no-strike clause and provisions for arbitration. Subsequent cases appear to have applied *Boy's Markets* to economic strike situations only." E.g., *Ice Cream Drivers* v. *Borden, Inc.*, 433 F. 2d 41 (2d Cir. 1970), cert. denied, 401 U.S. 940 (1971).

[25] The concept of encouraging self-help remedies in the context of a statutory scheme which itself affords remedies for unfair labor practices warrants a re-examination of the continuing validity of the unfair-labor-practice-striker rule.

It should be emphasized that it is entirely reasonable that the employer's commission of unlawful acts, even when known, may be deemed by the strikers to be minor or a predictable outgrowth of the strike, and not engender the concern leading to a prolongation or alteration of that strike. To an increasingly sophisticated labor movement the availability of arbitration and the NLRB as forums for the resolution of alleged unfair labor practices cannot be discounted; their availability may well induce strikers to rely on such formal procedures, especially since resulting decisions have prospective value as precedent which would be lacking in a particular strike-forced capitulation on the same issue. And the imputation to economic strikers of knowledge of the commission of unfair labor practices following the inception of the strike may well be unwarranted. For example, an employer's refusal to provide the union with certain requested information unrelated to a then-current economic strike may constitute an unfair labor practice, but it is not likely that such a statutory violation would become known to employees then striking for economic benefits. Similarly, an employer's unilateral adoption of a new work rule enforced against unit employees working in the plant may not reliably be expected to come to the attention of other unit employees then engaged in an economic strike. In neither case is the nature of the violative conduct likely to result in a change in the focus of the strike or to prolong it.[26]

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[26] The question of strikers' knowledge of the occurrence of unlawful conduct is presented in an aggravated form in cases where the finding of an employer's unfair labor practice is a result of a change in the law rendered after the conduct in question had occurred but announced in connection with other litigation concerning the strike. Would economic strikers become converted to unfair labor practice strikers in such a case under the Board's automatic-conversion theory? The retroactive effect given by the Board to substantive changes in the law makes such an inequitable result possible. See *Laidlaw Corp.* v. *N.L.R.B.*, *supra*.

It follows, therefore, that the reinstatement and back-pay rights of strikers who commenced an economic strike should not be governed by the Board's view that the commission of any unfair labor practices by the employer during the strike automatically converts such strikers to unfair labor practice strikers on the *assumption* that such practices *necessarily* changed the purpose of and prolonged the strike. Rather, as the rationale for the existence of the unfair-labor-practice-striker rule requires, the commission after the inception of a strike of unfair labor practices cannot be presumed to convert the status of the strikers absent proof that the purpose, outcome and duration of the strike had been altered as a consequence of such conduct.

B. The Strike Herein Was Not Activity Protected By The Act.

The goal of the union's strike activity in this case was to force the employer to agree to a consent election during the pendency of representation proceedings before the Board or to compel recognition by the employer without prior demand and without an election, or both. It is submitted that a union's strike to achieve either objective should be considered unprotected activity under the Act.[27] This is an issue to which the Court has not yet specifically addressed itself.

Section 9(c)(1) of the Act provides that:

> "Whenever a petition shall have been filed . . . the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide

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[27] The Board's view is, and has been, to the contrary. *Philas Oldsmobile, Inc.*, 137 NLRB 867; *New Orleans Roosevelt Corp.*, 132 NLRB 248. However, apart from the absence of judicial support for the Board's position, subsequent decisions of this Court would seem to compel a contrary view, as noted *infra*.

> for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballot and certify the results thereof." (Emphasis added)

This statutory provision creates a right to access to the Board's procedures in cases raising representation questions, and creates certain procedural guarantees to the parties to assure them a full and fair hearing of their views. The repeated Congressional use of the mandatory "shall" constitutes an element of the rights conferred on the parties named in or affected by such a petition. A strike to compel the holding of a consent election during the pendency of such a petition constitutes an effort to force the employer to forego access to the Board's processes and the guarantees and protections afforded by the opportunity for hearing and Board decision contemplated in Section 9. This Court has recently held, in an analogous situation, that such an effort is unlawful. In *N.L.R.B.* v. *Industrial Union of Marine Shipbuilding Workers*, 391 U.S. 418 (1968), the Court held to be violative of Section 8(b)(1)(A) a union's action in expelling and fining various of its members who had filed unfair labor practice charges against the union. The theory behind that holding was that conduct aimed at prohibiting or limiting access to the procedures of the Board was contrary to public policy and Congress' will. The same theory applied to the instant case should find the union in violation of the same statutory provision. At a minimum, it should be held that those who strike for such an objective do not engage in conduct affirmatively protected by Section 7 of the Act.

Similarly, a strike to force immediate recognition of the union, without prior demand and without permitting access to the Board's election machinery, constitutes an effort to deprive employers of the rights recognized by this Court in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S.

575 (1969). It was held there that in the absence of unfair labor practices by the employer which would prevent the holding of a fair election, an employer was entitled, as of right, to access to the Board's representation machinery in order to determine the union preferences of his employees.[28] The rationale of *Shipbuilding Workers* also applies to such an effort to force employers to forego their statutory rights and access to the Board. And, similarly, the activities of the strikers should not be deemed to be protected by Section 7.

In *N.L.R.B.* v. *Thayer*, *supra*, the First Circuit established certain accepted ground rules for the analysis of these matters. If an economic strike is not within the protection conferred by Section 7, the employer may terminate the employment of the strikers without violating the Act; that is, such terminations would not restrain or coerce employees in the exercise of their Section 7 rights. Since the Board's authority to order reinstatement derives from Section 10(c) and is dependent upon the commission of an unfair labor practice, therefore the reinstatement of an economic striker cannot be ordered by the Board unless the failure to reinstate would constitute an unfair labor practice; if the economic strike is not protected by Section 7, therefore, the discharge or failure to reinstate any of the strikers would not be remedied by the Board.

In the instant case, even assuming, arguendo, that the economic strikers had been discharged by the employer and had not been merely permanently replaced, since a strike to obtain recognition or to compel agreement to a consent election should not be viewed as protected by Section 7 (*Shipbuilding Workers*, *supra*), such "discharges" would not be prohibited by the Act.

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[28] In the instant case the alleged unfair labor practices of the employer occurred *after* the commencement of the strike in which the union sought to compel recognition or a consent election.

CONCLUSION

For the reasons stated herein, together with those raised by the respondent, it is urged that the decision below be affirmed with respect to the question of the requirements for conversion of an economic strike to an unfair labor practice strike, but that the Court should also declare that "economic" strikes to compel recognition or to force agreements to consent election, are not protected activities under Section 7 of the Act.

Respectfully submitted,

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